STATE OF MICHIGAN

COURT OF APPEALS

DAVID VANDERHYDE, CAROL VANDERHYDE, and THOMAS J. VANDERHYDE,

Plaintiffs/Counter-Defendants/ Third Party Defendants-Appellees,

and

EVANS FORD CORPORATION, d/b/a VANDERHYDE-MCKIMMY FORD,

Plaintiff/Counter-Defendant-Appellee,

and

VANDERHYDE BROTHERS FORD, INC., SHAWN VANDERHYDE, DANIEL C. CARBONNEAU, LILLIAN T. CARBONNEAU, JANE RUSSELL, RU-CHAR, INC., PERRY MCKIMMY, and FAYE MCKIMMY,

Third-Party Defendants-Appellees,

v

AMERICAN WAY GENERAL INSURANCE COMPANY,

Defendant/Counter-Plaintiff-Appellant.

AMERICAN WAY SERVICE CORPORATION,

Plaintiff-Appellant,

UNPUBLISHED
March 31, 1998

No. 179289
Kalamazoo Circuit Court
90-003643-CK

v

No. 180527
Kalamazoo Circuit Court
93-003566-CZ

SCHENK, BONCHER & PRASHER, GARY P. SCHENK, and GREGORY G. PRASHER,

Defendants-Appellees.

Before: Cavanagh, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

In Docket No. 179289, defendant American Way General Insurance Company ("American") appeals as of right from the judgment entered by the trial court following a bench trial. The trial court had ruled against American on most of the claims incorporated into its counterclaim and third-party claim in this complex case involving financial transactions regarding a Ford vehicle dealership in Galesburg. Defendant also appeals as of right from the trial court's pretrial order granting summary disposition in favor of plaintiffs, holding that the August 1989 mortgage between McKimmy and American Way was invalid. In Docket No. 180527, American appeals as of right from the same trial court's opinion and order awarding summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), thus concluding American's suit against the law firm of Schenk, Boncher & Prasher, and firm members Gary P. Schenk and Gregory G. Prasher, for alleged misconduct arising out of their representation of plaintiffs Vanderhyde and Evans Ford in Docket No. 179289. This Court ordered these cases consolidated.

In their complaint against defendant American, plaintiffs alleged that American had committed slander of title by refusing to discharge McKimmy's second mortgage on the dealership property. Before trial, American moved for summary disposition of this count of plaintiffs' complaint, but the trial court, after hearing arguments on the issue, granted summary disposition for plaintiffs Vanderhyde, ruling that the second mortgage was invalid. American appealed, raising this issue and numerous other issues. Since oral arguments were heard in this matter, this Court has become aware, through its own review of the voluminous record, of a defect in the chain of title regarding the dealership real estate. Although this defect was not raised by any party or by the trial court, we raise it now sua sponte, acknowledging its potential significant impact on this litigation as a whole.

In 1986, the then-owners of the Galesburg automobile dealership conveyed by warranty deed their interest in the real estate on which the dealership was located "to DAVID W. VANDERHYDE and CAROL L. VANDERHYDE, husband and wife, as to an undivided 34% interest, THOMAS J. VANDERHYDE, a single man, as to an undivided 33% interest, and PERRY McKIMMEY [sic], a single man, as to an undivided 33% interest." Because the deed did not state otherwise, it is presumed under Michigan law that David and Carol Vanderhyde, took their single share as tenants by the entirety, as husband and wife between themselves, and as tenants in common with Thomas Vanderhyde and

Perry McKimmy, each of whom took their respective shares individually. MCL 554.44, 554.45; MSA 26.44, 26.45; Michigan Land Title Standards (5th ed), Standard 6.7.

In 1989, the Vanderhydes agreed to sell their respective interests in the dealership to McKimmy, who would become the sole owner. To finance the deal, McKimmy executed, on August 22, 1989, a mortgage and four promissory notes, totaling $395,000, in favor of American Way. One promissory note for $97,000 was secured by a second mortgage on the dealership real estate. This mortgage and note was executed by Perry McKimmy. Three days later, on August 25, 1989, the Vanderhydes quitclaimed their respective shares of the dealership to "PERRY McKIMMY, JR., and FAYE A. McKIMMY, husband and wife as joint tenants with full rights of survivorship."

From this point forward, the parties and the trial court have assumed that the McKimmys owned 100 percent of the dealership as "husband and wife as joint tenants with full rights of survivorship." This is not accurate. Following David and Carol Vanderhyde's and Thomas Vanderhyde's separate conveyances by quitclaim deed of their interests (34 percent and 33 percent, respectively) in the real property to Perry and Faye McKimmy, as husband and wife, the McKimmys owned a 67 percent interest as "joint tenants with full rights of survivorship." The status of the remaining 33 percent interest—which had been conveyed in 1986 to Perry McKimmy, "a single man"—was unchanged. Perry McKimmy continued to own his individual 33-percent share in the property as a tenant in common with the 67 percent share owned by him and his wife as joint tenants with full rights of survivorship.[1] Thus, the mortgage and $97,000 note executed by Perry McKimmy alone was valid at least to the extent of his individual 33 percent interest in the property.

This leads us to the question whether American's mortgage was also valid to the extent of the McKimmys' 67 percent share that they held as "joint tenants with full rights of survivorship." In Michigan, a deed or devise of real property to two persons who are in fact husband and wife is presumed to create a tenancy by the entirety, unless a contrary intent is clearly expressed in the instrument. MCL 554.44, 554.45; MSA 26.44, 26.45; Michigan Land Title Standards (5th ed), Standard 6.5. In *Hoyt v Winstanley*, 221 Mich 515; 191 NW 213 (1922), the Michigan Supreme Court noted that "[e]states in joint tenancy are not favored," *id*. at 519-520, and held that to create a joint tenancy by a conveyance to a husband and wife, "the words used must be sufficiently clear to negative the common-law presumption that an estate by entirety was intended." *Id*. at 519. The Court concluded, "We think it must be held under the circumstances of this case, that the deed to 'Jasper Winstanley and wife as joint tenants,' conveyed an estate by the entirety." *Id* at 520. The Court subsequently interpreted *Hoyt* "to require that in order not to create a tenancy by the entirety in realty conveyed to husband and wife, even the use of the words 'as joint tenants' is insufficient. The only alternative seems to be to use the words 'not as tenants by the entirety' when such is the intent of the conveyance." *DeYoung v Mesler*, 373 Mich 499, 503-504; 130 NW2d 38 (1964). See also 1 Cameron, *supra* at § 9.13, p 312; *Butler v Butler*, 122 Mich App 361, 365-369; 332 NW2d 488 (1983).

Here, the language in the deeds to the McKimmys did not expressly overcome the statutory presumption that a tenancy by the entireties was intended. Thus, we conclude that the McKimmys held their 67 percent share of the property as tenants by the entirety. "Generally, neither spouse can convey

away an interest in land held by the entireties. Both must do so to make the transfer valid." 1 Cameron, *supra* at § 9.15, p 314. Therefore, American's second mortgage on the McKimmys' 67 percent interest in the property was invalid, because the mortgage was signed only by Perry McKimmy. Accordingly, to the extent of Perry McKimmy's individual 33 percent interest in the property, plaintiffs' slander of title claim against American is dismissed.

We are keenly aware that our resolution of this issue of law, in light of the unacknowledged defect in the chain of title, has the potential to change the entire dynamics of this litigation. Moreover, it raises certain questions that have not been raised before by the parties, such as the status of the chain of title following the McKimmys' September 1990 warranty deed to the Vanderhydes. For these reasons, we decline at this time to address the parties' remaining issues raised in their briefs on appeal. Instead, we remand this matter to the trial court, which shall determine, in light of our holding above and in consultation with the parties, the nature of any further proceedings necessary to resolve the parties' remaining claims.[2]

Reversed in part and remanded to the trial court for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.

[1] We further note that American's lien against the property, as a result of the purchase money mortgage executed by Perry McKimmy, was superior to Faye McKimmy's inchoate dower right in the mortgaged land. See Michigan Land Title Standards (5th ed), Standard 4.5.

[2] We do take this opportunity to strongly encourage the parties on remand to settle this matter.